(17)

No. 90-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS CIPOLLONE, individually, and as Executor of the Estate of Rose Cipollone,

Petitioner,

—v.—

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATERS, INC., a New York Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

Interest of Amicus

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondents in this case. Letters of consent to the filing of this brief have been lodged with the clerk.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of

businesses to advertise both nationally and regionally. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of annual national and regional advertising expenditures in the United States. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

Introductory Statement and Summary of Argument

As national advertisers, the members of A.N.A. are acutely aware of the costs and drawbacks of patchwork local regulation of the commercial speech process. When speakers seeking to communicate with a national audience are forced to comply with a series of overlapping and, often, conflicting state and local rules, two adverse speech consequences inevitably follow. First, the duty to comply with differing local speech regulations impedes effective communication by complicating and, often, precluding the use of uncluttered uniform messages and nationwide media that are the most effective means of mass communication. Second, the cost of local tailoring imposes a significant and wholly unnecessary economic burden on the commercial speech process.

Where, as in this case, Congress has elected to establish uniform national standards governing a significant category of commercial speech in order to avoid the drawbacks imposed by patchwork local regulation, A.N.A. believes that deference to Congress' will requires displacement of differing state and local rules of law.

When Congress legislates pursuant to its enumerated powers, it may, pursuant to Article VI, cl. 2, elect to displace state law that interferes with the full attainment of Congressional purpose. *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.).

In deciding whether Congress has elected to displace state law, this Court looks, first, to the text of the federal statute. Where, as here, Congress has manifested an unmistakable textual intention to displace differing "requirement[s] and prohibition[s] . . . imposed under State law", this Court has given full scope to the Congressional text. Indeed, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), this Court held that language virtually identical to the language used by Congress in this case preempted differing state common law norms. See also *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Even where no Congressional text governing preemption exists, or where the words used by Congress to describe a statute's preemptive effect are ambiguous, this Court has consistently respected Congress' intent to displace state law when preemption is necessary to carry out Congress' intention to establish uniform national standards of behavior, especially in contexts involving the regulation of speech. In areas as diverse as regulation of aliens[1], labor law[2], commercial speech[3], national security[4], broadcast regulation[5], and securities regulation[6], this Court has repeatedly enforced Con-

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1 *Hines v. Davidowitz*, 312 U.S. 52 (1941).

2 *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976).

3 *Franklin National Bank v. New York*, 347 U.S. 373 (1954); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

4 *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

5 *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *City of New York v. F.C.C.*, 486 U.S. 57 (1988).

6 Compare *Edgar v. MITE Corp.*, 457 U.S. 624, 630-640 (1982) with *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 83 (1987).

gress' refusal to permit state and local rules to undermine the Congressional balance between freedom and regulation.

Finally, once Congress has manifested an intent to displace state law in order to achieve a uniform national standard governing particular speech or conduct, this Court has repeatedly refused to draw preemption distinctions between and among state statutes, state administrative regulations and state common law actions, recognizing that the continued existence of each impedes the uniform national standard of behavior desired by Congress. Eg. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (preempting common law damage actions); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). See also *Erie R. Co v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

In this case, Congress could not have been more explicit in its desire for uniform national standards governing the delivery of information by advertisers to consumers concerning the relationship between smoking and health. Congress mandated a uniform consumer health warning, explicitly displaced differing requirements and prohibitions imposed by state law and carefully retained the ongoing jurisdiction of the Federal Trade Commission over false and misleading tobacco advertising. State damage actions premised on differing state duties imposed on advertisers would destroy Congress' handiwork.

Finally, petitioner's pseudo-Solomonic invitation to distinguish between failure to warn claims and misrepresentation claims for the purposes of preemption would embark courts and juries on a wholly artificial and completely unpredictable semantic quest that would doom Congress' effort to forge uniform standards governing the area. Since Congress carefully preserved the ongoing jurisidiction of the Federal Trade

Commission over false and misleading tobacco advertising, no basis exists to invent a standardless exception to Congress' desire for uniform commercial speech rules in the area of smoking and health.

Accordingly, the decisions of the overwhelming majority of the courts below upholding preemption of the claims at issue on this appeal are correct.[7]

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7 Five federal appeals courts have found the claims raised in this appeal preempted. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), followed, 893 F.2d 541 (3rd Cir. 1990); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989). Four state appellate courts have agreed with their federal counterparts. *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super Ct. 1990); *Phillips v. R.J. Reynolds Industries, Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988); *McSorley v. Phillip Morris*, No. 536E (App. Div. N.Y. 1991). One state appellate court has found partial preemption. *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989). Two state appellate courts have declined to find preemption. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990); *Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498 (Tx. Ct. App. 1991).

ARGUMENT

CONGRESS INTENDED TO ESTABLISH A UNIFORM NATIONAL RULE GOVERNING THE DELIVERY OF INFORMATION BY ADVERTISERS TO CONSUMERS CONCERNING THE RELATIONSHIP BETWEEN SMOKING AND HEALTH. ACCORDINGLY, STATE LAW, INCLUDING STATE COMMON LAW, THAT PURPORTS TO APPLY A DIFFERENT RULE IS PREEMPTED

1. The Manifest Purpose of the Cigarette Labeling Act Was the Establishment of a Uniform National Standard Governing the Delivery of Information by Advertisers to Consumers Concerning the Relationship Between Smoking and Health

Congress made no secret of its purpose in enacting the Cigarette Labeling Act of 1965.[8] Spurred by the 1964 Report of the Surgeon General[9] and by the proliferation of uncoordinated local responses to the question of how best to convey

8 Congress' Statement of Purpose provides:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. Pub. L. No. 89-92, 79 Stat. 282, reprinted in 1965 U.S. Code Cong. & Admin. News 300.

9 *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. Dept. of Health, Education and Welfare (Jan. 11, 1964).

adequate health information to consumers, Congress acted to establish a uniform national standard governing an advertiser's duty to inform consumers of the relationship between smoking and health by: (1) mandating a prescribed federal health warning on each package of cigarettes[10]; and (2) banning the patchwork of local prohibitions and requirements that threatened to Balkanize the communications process.[11]

Congress' aim in imposing a uniform nationwide standard governing the transmission by advertisers of information concerning the relationship between smoking and health was twofold. First, Congress recognized that the prime ingredients of effective mass communication are simplicity, uniformity and repetition. Congress understood that a single, uniform

10 The warning initially read:

> *Caution: Cigarette Smoking May Be Hazardous to Your Health.*

In 1970, the warning was amended to:

> *Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.*

See Pub. L. No. 89-92, 79 Stat. 282 and Pub. L. No. 91-222, 84 Stat. 87.

11 The operative preemption provisions of the 1965 Act provide:

> Section 5 (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with this Act.

Pub. L. 89-92, 79 Stat. 282. In 1970, Section 5(b) was amended to read:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 87. The jurisdiction of the Federal Trade Commission over allegations of false or misleading cigarette advertising was specifically retained. *Id.*

health warning, uncluttered by local embellishments, was the most effective nationwide method of informing consumers of the Surgeon General's concerns.[12] Second, Congress recognized that the impracticability—indeed, impossibility—of attempting to market a product nationally while seeking to comply with a patchwork of differing local communication requirements and prohibitions would impose significant burdens on an industry that produced the nation's third leading agricultural export, its fifth largest cash crop and supported over 750,000 families.[13]

Accordingly, Congress imposed a uniform set of rules governing the commercial speech process that achieved effectiveness, practicality and economy through the mandatory repetition of an uncluttered uniform nationwide health warning to each consumer.

Whenever Congress has manifested a similar desire to impose uniform nationwide rules governing behavior, this Court has given full scope to Congress' decision to displace state standards that threaten to introduce variations into the uniform scheme.

For example, in the cases charting the preemptive effect of ERISA, culminating in *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478 (1990), this Court recognized that Congress wished to establish uniform, nationwide rules governing the administrative cost structure of ERISA pension plans in order to assure that employers would not reflect state cost variations by altering employee benefits. Accordingly, state rules of law, both statutes and common law claims, with the capacity to alter the administrative cost structure of an ERISA plan have been deemed preempted,

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12 Congress' Statement of Purpose, quoted *supra* at n. 8, noted the risk of "diverse, non-uniform, and *confusing* cigarette labeling and advertising regulations. . ." (emphasis added).

13 111 Cong. Rec. 13,950, 13,898 (1965) (Remarks of Sens. Ervin and Bass), cited in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) at 622, n.2.

even when they are explicitly designed to assist employees in enjoying the plans. Eg. *Ingersoll-Rand Co. v. McClendon*, *supra*; *FMC v. Holliday*, ____ U.S. ____, 111 S.Ct. 403 (1990); *Mackey v. Lanier Collection Agency & Service Inc.*, 486 U.S. 825 (1988).

Even in the absence of a strong textual preemption provision, such as the provision present in this statute and in ERISA, this Court has carefully preserved Congress' decision to establish uniform national standards governing particular economic activity by preempting state common law rules that threaten to introduce non-uniform legal duties. Thus, in *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court recognized that Congress intended to establish uniform nationwide standards governing abandonment of rail lines by interstate carriers. Accordingly, the Court ruled that Congress had preempted Iowa's common law cause of action for damages for wrongful abandonment. See also *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Moreover, this Court has repeatedly recognized that when, as here, Congress regulates in areas involving speech, the need for uniform nationwide rules reflecting Congress' view of the appropriate balance between freedom and regulation preempts state and local attempts to alter the Congressional balance. Indeed, Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Garner v. Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank v. New York*, 347 U.S. 373 (1954); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467

U.S. 691 (1984); *City of New York v. F.C.C.*, 486 U.S. 57 (1988). See also *Edgar v. MITE Corporation*, 457 U.S. 624, 630-640 (1982).

For example, in the context of labor relations, in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), this Court held that the National Labor Relations Act impliedly preempts state common law remedies for injunctive relief against peaceful recognitional picketing. In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court held that state common law damage claims arising out of peaceful picketing activity were, likewise, impliedly preempted by the NLRA. In *Teamsters Union v. Morton*, 377 U.S. 252 (1964), the *Garner-Garmon* rule was applied to preempt state common law damage claims for secondary picketing activity. Finally, in *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976), this Court ruled that state laws forbidding concerted refusals to work overtime were preempted, as well.[14]

In the context of broadcast regulation, this Court has also respected Congress' desire for uniform national standards when national communications are at issue. For example, in *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959), this Court ruled that state common law actions for libel against

14 See also *Bus Employees v. Missouri*, 374 U.S. 74 (1963); *Michigan Canners & Freezers v. Agricultural Board*, 467 U.S. 461 (1984).

In *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), the Court declined to wholly preempt claims for libel in the context of a labor dispute. Instead, the Court effected a partial preemption that displaced state libel law in private labor settings if it permitted recovery short of a showing of malice identical to the constitutional standard for political settings established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The net result of *Linn* was to establish highly protective uniform national legal standards governing libel in a labor context, but to rely on state courts to apply them. The Court followed the identical path in connection with suits for intentional infliction of emotional distress. *Farmer v. United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977).

broadcasters were preempted by the Federal Communications Act. Similarly, in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), this Court ruled that federal law preempted Oklahoma's attempt to ban liquor advertising from local cable television. Most recently, in *City of New York v. F.C.C.*, 486 U.S. 57 (1988), New York City's attempt to set technical standards for local cable television was held preempted by the Cable Broadcasting Act.

Perhaps the most dramatic examples of the role of preemption in assuring a uniform national standard in the area of speech and association have taken place in the national security area. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), a Pennsylvania Alien Registration statute imposing significant restrictions on the civil liberties of aliens was held preempted by the Federal Alien Registration Act because the Pennsylvania statute altered the balance between freedom and regulation set by Congress. Similarly, in *Pennsylvania v. Nelson*, 350 U.S. 497 (1950), the Smith Act was held to preempt attempts by the states to prosecute for sedititon against the United States.

Finally, in the commercial speech context at issue in this case, this Court has long respected Congress' intention to impose uniform national standards when it regulates commercial speakers. For example, in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), this Court held that the federal statute authorizing national banks to accept savings deposits preempted New York's limitation on the use of the word "saving" or "savings" in bank advertising. Similarly, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), this Court ruled that federal weight labeling rules preempted California's attempt to impose more stringent weight labeling standards, precisely because differing state rules would interfere with a uniform national communication system. A similar commitment to uniform national standards governing speech doomed Oklahoma's attempt to regulate liquor advertising on local cable television in *Capital Cities Cable, Inc. v. Crisp*, *supra*.

Thus, when Congress acted to impose a uniform set of national standards governing commercial speech about the relationship between smoking and health, it acted against a backdrop of consistent recognition by this Court that Congressional establishment of national communications standards preempts differing state and local rules of law.

2. State Common Law Damage Actions That Conflict With the Cigarette Labeling Act Are Preempted

Petitioner argues that common law damage actions are not preempted: (1) because they fall outside the literal words of Congress' preemption clause; and (2) because damage actions would not undermine Congress' desire for uniform communications rules. Petitioner's attempt to carve out a unique preemption status for common law damage actions fails on both grounds.

The express language of the preemption clause in the Cigarette Labeling Act talks in terms of "requirement[s] or prohibition[s] . . . imposed under State law". Common law damage awards, argues petitioner, are not "requirements" or "prohibitions" at all; but merely the economic costs of a given course of unlawful conduct, leaving a defendant free to continue its lawless conduct subject to the risk of continuing future damage awards.

Such a myopic view ignores the fact that a common law damage recovery must be based on the violation of a common law duty that imposes legally enforceable "requirements" or "prohibitions" on a defendant. It is, of course, precisely the existence of such differing state and federal legal duties affecting the commercial speech process that Congress intended to preempt.

Not surprisingly, when Congress has used the phrases "state law" or "requirements" to define the preemptive reach of a federal statute, this Court has recognized that inconsistent state statutory and common law norms are equally displaced. For example, in preemption cases arising under ERISA, this Court has recognized that common law

damage actions fall within the phrase "state law" used by Congress to define the scope of preemption. *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478 (1990).[15]

Even more dramatically, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), a federal banking regulation explicitly displaced "*state law* which *imposes* different . . . *requirements*" 41 Fed. Reg. 18286, 18287 (1976). (emphasis added). Faced with preemption language that is literally identical to the language used by Congress in this case, this Court held in *de la Cuesta* that differing state common law rules were fully preempted.

The recognition in *de la Cuesta* that the phrase "requirements" "imposed" by "state law" preempts both statutory and common law norms reflects a realization that Congress' desire to establish uniform standards of conduct in a given area would be frustrated by any conflicting State rule—common law or statutory—having the force of law. Thus, this Court has repeatedly preempted state common law damage actions on the same terms and conditions as state statutes. Eg. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters v. Morton*, 377 U.S. 252 (1964); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (equating state common law and state statutory law).[16]

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15 In ERISA, Congress explicitly defined "state law" to include "laws, decisions, rules, regulations or other state action having the effect of law". In the Cigarette Labeling Act, Congress also used the phrase "state law" in the preemption clause, but, unlike ERISA, did not add a definitional section. No basis exists to suggest that Congress intended "state law" to mean radically different things in the two statutes, or that Congress believed its use of "state law" in ERISA was aberrational.

16 As Justice Harlan noted in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) and *Hanna v. Plumer*, 380 U.S. 460,

The two principal cases cited by petitioner to support a distinction between statutory rules and common law damage actions for the purposes of preemption in fact illustrate Congress' reluctance to draw such distinctions among categories of legal rule.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court held that Congress' decision in the Price-Anderson Act to authorize state compensatory damage claims arising out of the operation of nuclear facilities implied a willingness to permit the entire panoply of state tort remedies, including punitive damages. Similarly, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), Congress' decision to permit state substantive tort law to govern claims arising out of the operation of a federal nuclear facility, coupled with Congress' explicit decision to submit the facility to state workmen's compensation law, implied a willingness to permit the full scope of Ohio's Workmen's Compensation Law to operate, including enhanced damages for ignoring state safety regulations.

Thus, unlike this case, both *Silkwood* and *Goodyear Atomic* involve settings where Congress explicitly decided to permit non-uniform state laws to govern the operation of federally-regulated facilities. Having made that fundamental judgment, Congress then permitted the full range of state law remedial mechanisms to operate. In this case, having decided

474 (1965) (Harlan, J. concurring), *Erie* and preemption are two sides of the same coin. Cases under *Erie* ask whether the existence of differing rules of common law governing diversity cases in federal courts interfere with the constitutional authority of the states to regulate primary behavior. If so, the federal norms are displaced.

Preemption cases ask whether the existence of differing state and federal rules of law interfere with the constitutional authority of Congress to regulate pursuant to its enumerated powers. If so, the state norms are displaced.

Since the historic ruling in *Erie*, the Court has consistently—and correctly—refused to distinguish between common law and statutory rules in either setting, recognizing that both judge-made and statutory law operate to regulate behavior.

to displace non-uniform state norms in favor of a uniform national rule, Congress would hardly be likely to sabotage its handiwork by drawing precisely the type of arbitrary distinctions between statutory and common law rules that it rejected in *Silkwood* and *Goodyear Atomic*.

Petitioner's insistence that common law damage actions do not pose a threat to Congress' desire for uniform standards of behavior ignores the role of the common law in shaping "primary" behavior.[17] While compensation is, of course, a significant function of the common law of torts, tort law is designed, as well, to shape the future behavior of persons subject to its strictures. Petitioner's suggestion that compensatory damage recoveries do not exert a "regulatory" pressure on potential defendants to alter their behavior ignores reality and denigrates the normative value of law.

Viewed solely as a matter of enlightened self-interest, potential tort defendants will, of course, alter their behavior to avoid future liability. Moreover, even if, in purely economic terms, a potential defendant were tempted to follow petitioner's advice and ignore a state common law duty, he would risk massive punitive damage liability, a virtually certain injunction and the risk of criminal sanctions. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, ____ U.S. ____, 111 S.Ct. 1032 (1991). See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). As Judge Brown put it in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987), a tort defendant saddled with a compensatory damage verdict is as free to continue his unlawful conduct as is a drowning man to refuse to come up for air.

Finally, petitioner's casual view of the obligations imposed by common law duties ignores the normative value of law. Law in our society is more than a cost/benefit exercise that

17 The terms "primary" and "secondary" behavior, as well as the terms "pre-" and "post-event behavior" are drawn from Justice Harlan's celebrated concurrence in *Hanna v. Plumer*, 380 U.S. 360, 374 (1965).

invites persons to opt out of its strictures upon payment of a fine. Law imposes a duty to obey, not merely because a "bad man" fears the consequences of non-compliance, but because life in a complex society imposes a moral—and powerfully compelling—duty to obey the law. When the law speaks—common or not—people should listen, not merely because they are afraid of formal sanction, but because voluntary compliance is morally expected of them in a civilized society.

3. Preempting the State Law Claims Involved in this Appeal Would Neither Create a Regulatory Void, Nor, Under Petitioner's View of the Case, Deprive Injured Persons of a Tort Remedy

Petitioner argues that Congress could not have intended to preempt state common law damage claims premised on advertising or promotion because preemption would create a regulatory void that would amount to a "license to lie" about the health risks associated with smoking.

Putting aside the fact that the federally mandated health warnings were explicitly deemed by Congress to provide adequate warnings to consumers, petitioner's argument completely overlooks the fact that Congress carefully retained the jurisdiction of the Federal Trade Commission over false and misleading claims by tobacco advertisers.[18] Having established uniform national rules governing the communication of information by advertisers to consumers concerning the relationship between smoking and health, Congress explicitly empowered the Federal Trade Commission to continue to police the accuracy of tobacco advertising, including the power to require warnings on advertisements as well as packages.[19] Indeed, it was the efforts of the F.T.C. that persuaded the industry to agree in 1972 to display health warnings on all cigarette advertisements, in addition to displaying a health warning on each package of cigarettes.[20]

18 See 15 U.S.C. § 45; 15 U.S.C. 1336(b).

19 15 U.S.C. 1336(a).

20 See *In re Lorilard*, 80 F.T.C. 455 (1972).

Moreover, the existence of F.T.C. jurisdiction over false and misleading cigarette advertising is a complete answer to petitioner's attempt to drive a standardless semantic wedge between "misfeasance" and "non-feasance" involving communications concerning the relationship between smoking and health. Even without the F.T.C.'s regulatory authority, it would have proven impossible to distinguish, for preemption purposes, between so-called failure to warn claims and so-called affirmative misrepresentation claims. The very uncertainty of the utterly arbitrary line between "failing to warn adequately" and "misrepresenting" would have doomed Congress' desire for uniform speech rules in the area. Simply stated, no two states—indeed, no two juries within the same state—would have drawn the line in the same place, inevitably leading to precisely the patchwork of local speech rules that Congress sought to prevent.

Fortunately, the F.T.C.'s conceded power over false and misleading advertisements obviates the need to strain to avert an alleged regulatory void by resorting to semantics about whether a given advertisement fails to warn adequately or affirmatively misrepresents the relationship between smoking and health. The F.T.C. has full authority to deal effectively with both categories of claims without having to engage in the impossible task of parsing verbal non-feasance from verbal misfeasance.

The technique of displacing state common law damage remedies, while vesting continuing supervisory authority in a federal administrative agency, is commonly utilized by Congress, especially in settings governing the regulation of speech and association. For example, in the labor law context, state damage claims for lawful peaceful picketing, as well as secondary picketing[21], have been preempted, with continuing supervisory authority over the activity vested in the National

21 For the standards governing secondary picketing, see *N.L.R.B. v. Retail Store Employees*, 447 U.S. 607 (1980); *N.L.R.B. v. Fruit Packers*, 377 U.S. 58 (1964). Secondary picketing is distinguished from secondary leafleting in *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988).

Labor Relations Board. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Teamsters Union v. Morton*, 377 U.S. 252 (1964). Similarly, in the broadcast area, state common law libel actions against broadcasters were preempted, with continuing supervisory authority in the Federal Communications Commission. *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959). Finally, in the commercial speech context, state rules governing the disclosure of accurate product weights were preempted, with continuing supervisory authority in the Federal Trade Commission. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (federal policy of disclosure preempts state policy of prohibition).

Thus, rather than resulting in a regulatory void, preemption of health-related claims premised on cigarette advertising and promotion would carry out a carefully calibrated regulatory program pursuant to which Congress imposed uniform, economical and effective commercial speech rules by: (1) mandating uniform national consumer health warnings; (2) expressly displacing differing state regulations and prohibitions and (3) vesting ongoing supervisory authority over tobacco advertising in the Federal Trade Commission.

Finally, petitioner argues that Congress could not have intended to strip injured persons of all tort remedies for damages to health caused by smoking. The short answer to petitioner is that petitioner himself has argued in the lower courts that preemption of the claims raised in this appeal does nothing of the kind. Petitioner has vigorously argued below that the preemption aspects of the Cigarette Labeling Act are confined to claims arising out of the advertising and promotion of cigarettes. Accordingly, petitioner has consistently argued that no preemption occurs with respect to design defect claims; no preemption occurs with respect to pre-1965 Act claims, including the post-1965 consequences of pre-1966 tobacco use; and, most importantly, no preemption occurs with respect to strict liability claims that impose so-called risk/utility damages on a manufacturer without regard to the adequacy of any warning.

Petitioner's view of the limited preemptive nature of the Cigarette Labeling Act is, of course, not before the Court in this appeal, which deals solely with the Act's preemptive effect on claims arising out of advertising and promotion. However, petitioner can hardly argue that preemption of claims arising out of advertising and promotion would deprive him of any tort remedy, while at the same time asserting in the lower courts that, regardless of the outcome of this appeal, significant tort remedies remain available to him.

Congress, in enacting the Cigarette Labeling Act, sought to assure that consumers were informed of the health risks associated with smoking without imposing undue burdens on the tobacco industry. State common law damage actions based on advertising or promotion would doom the Congressional plan. A patchwork of differing state common law duties would inevitably erode the use of a simple uniform national warning message and would significantly—and needlessly—increase the cost of compliance. Accordingly, the Third Circuit's opinion should be affirmed, freeing the trial court to continue with petitioner's remaining claims for relief.

Conclusion

For the reasons stated above, the decision of the court below should be affirmed.

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Respectfully submitted,

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